Proceeding: IMPLEMENTATION OF SECTION 255 OF THE TELECOMMUNICATIONS AC Record 1 of 1

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Before the
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Washington, D.C.

In the Matter of	)	
Implementation of Section 255 of the	)	
Telecommunications Act of 19%	)	
Access to Telecommunications Services,	)	WT Docket No. 96- 198
Telecommunications Equipment, and	)	
Customer Premises Equipment	)	
by Persons with Disabilities	)	

COMMENTS OF THE AMERICAN FOUNDATION FOR THE BLIND

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COMMENTS OF THE AMERICAN FOUNDATION FOR THE BLIND

The American Foundation for the Blind ("AFB") hereby submits comments in the above-captioned proceeding.

The mission of the American Foundation for the Blind is to enable persons who are blind or visually impaired to achieve equality of access and opportunity in all aspects of society. AFB accomplishes this mission, in part, by taking a national leadership role in the development and

implementation of public policy and legislation.

Since it initially developed the 33 1/3 RPM phonograph record in the 1930's, which was used by the Library of Congress in its "Talking Books" for the blind program, APB has assumed a leadership role in the effort to ensure that technology (including computers, telecommunications, the Internet, and television) are accessible to and usable by people who are blind or visually impaired. AFB staff was actively involved in passage of Sec. 255 of the Telecommunications Act of 1996, and also served as cochair of the Technical Advisory Committee which developed guidelines for accessible telecommunications products and services which were adopted by the Architectural and Transportation Barriers Compliance Board (hereinafter the "Access Board" or "Board").

Whether the job was to evaluate assistive technology such as braille printers or speech access for computers in our evaluation laboratory; to obtain initial federal funding for video description which makes television programming more accessible to blind persons; or to work to

ensure access to the World Wide Web through the World Wide Web Consortium's Web Access Initiative, AFB believes that access to information and technology is critical to the education, employment, and independence of people who are blind or visually impaired. AFB is therefore critically interested in these proceedings and pleased to provide these comments to the Commission concerning implementation of Section 255 of the Act.

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SUMMARY

The Commission's Notice of Proposed Rulemaking ("NPRM") has properly recognized that Section 255 of the Telecommunications Act of 1996 was intended to ensure "that *all* Americans can gain the benefits of advances in telecommunications services and equipment;"[1] to this end the scope of Section 255 is both "broad and practical." Thus, in establishing regulations, it is the Commission's obligation to ensure that the rules actually result in access to telecommunications services, equipment and CPE, even as technologies converge and networks evolve to use different or multiple technologies for telecommunications.

The NPRM is aimed in the right direction, and is laudable in several respects, including in its acceptance of key elements of the recommendations of the Access Board. Nonetheless, the NPRM falls short. It does not propose to establish regulations that will be sufficiently clear and comprehensive to achieve accessibility. Most notably:

- In order to ensure that accessibility is achieved, the Commission needs to make it clear that it will read the terms "telecommunications services," telecommunications equipment," and "customer premises equipment" broadly and functionally. APB is concerned that companies that are now building the most advanced products and networks -- especially those based on such as packet-switching -- will not take the steps

[1] NPRM, lll13-4.

required to make these network features and products fully accessible unless the Commission ensures functional parity and technology neutrality. Further, because the Commission decided to defer universal service issues as they affect the disabilities community to this proceeding, it is critical that the rules adopted here ensure that the services provided pursuant to the universal service mandates are also accessible to the disabled. ***See discussion at pp.*** *6-10.*

- The Commission properly recognizes that accessibility issues arise at every stage of product development, from design through marketing. The Commission also recognized that in a changing environment, companies should have reasonable latitude to address accessibility issues. However, if companies are going to be relied upon to determine the ***manner*** in which accessibility will be addressed, it is critical that each company devise a

plan for addressing accessibility issues; that each company maintain records sufficient to show that accessibility issues are being addressed; and that this information be made available to persons complaining that equipment or services are not accessible. The NPRM does not require companies to establish a plan, nor does it require maintenance of adequate records, nor does it clearly require the production of critical information. Absent these requirements, the enforcement procedures that the Commission has devised are likely to be ineffective. ***See discussion at pp. 20-22.***

- The efficacy of the Commission's rules may turn in large part on the adequacy of the standards that will be used in formal complaint proceedings to determine whether accessibility is readily achievable. The standards that the Commission proposes are quite complex. At the very least, the Commission needs to be clear that under certain

circumstances, it will presume that access is readily achievable. Effectively, the Access Board intended to establish such a presumption when it concluded that there should be no net ***decrease*** in accessibility. Likewise, the availability of an accessible product in the marketplace should give rise to a presumption that accessibility was "readily achievable" for similar products. ***See discussion*** *at pp.22-24.*

- The formal and informal complaint processes needs to be clarified so that it is clear who bears the burden of proof, at what stage of the proceeding. Under the Commission's approach to Section 255, almost all the information critical to resolving a complaint will be in the control of the company that has allegedly failed to provide the accessible service or equipment. The burden of proving that accessibility is not readily achievable should fall upon the company. ***See discussion at pp.*** *35-40.*

- The procedural process through which complaints are to be resolved should be practical for both sides. The Commission has opted for a "fast-track" approach that contains deadlines that are likely to be missed for quite innocent reasons...vacations, illness and the like. The deadlines are particularly significant because the informal complaint process is intended to be cooperative, rather than a highly legalistic process. But the deadlines make

it less likely that anyone will have the time to cooperate. While a process with a definite deadline is critical, realistic deadlines are just as critical. Those deadlines should include deadlines for FCC action. See ***discussion at pp. 36-39.***

I. THE SCOPE OF THE COMMISSION'S RULEMAKING AUTHORITY.

AFB agrees that the FCC has the authority (and in fact, the obligation) to adopt regulations to implement Section 255. But, AFB believes that the Commission unduly

minimizes the role of the Access Board when it concludes (at ¶30) that it has "discretion" regarding the use of the Board's guidelines, and proposes only to accord "substantial weight" to those guidelines in connection with this proceeding*.

[2] NPRM, [redacted]

Section 255 states that the "Board shall develop guidelines" for equipment "in conjunction with the Commission and that the "Board shall review and undate the guidelines periodically."[3] (Emphases added). If the Commission had broad discretion to reject the Board's guidelines, the Board's right to review and update would be meaningless. A plain reading of the "in conjunction with" language suggests more of a partnership than the Commission's "substantial weight" test reflects. At a bare minimum, assuming the Commission has authority to reject the Board's guidelines or to modify them, the Commission must at least show that there is a substantial basis for departing from the guidelines, supported by the record. This has not been done, and the final rules should adhere more clearly to the Access Board guidelines! This is particularly so because the guidelines were the product of extended comment and negotiations between the industry and the disabilities community.

II. THE COMMISSION MUST READ ITS AUTHORITY UNDER SECTION 255 EXPANSIVELY.

A. Services Subject To Section 255.

[3] NPRM, ¶ 9.

[4] In paragraph 74, The Commission appears to propose to adopt specific technical access requirements from the Access Board guidelines (specifically Sections 1193.4 I Input, controls, and mechanical functions and Section 1193.43 Output, display, and control functions); and, further in paragraph 9 1-92 the NPRM includes the five criteria listed in the guidelines at Section 1193.5 1 Compatibility. APB believes these sections should be explicitly adopted. Likewise the remaining substantive sections of the guidelines should be adopted so that they apply equally to equipment manufacturers and service providers. These sections cover important areas such as market research, access testing and validation, outreach to people with disabilities, and accessible documents and customer support.

Section 1193.23 Product Design, Development and Evaluation
Section 1193.33 Information, documentation and training
Section 1193.37 Information pass through
Section 1193.39 Prohibited reduction of accessibility, usability and compatibility

In the NPRM, the Commission concluded that the definitions of telecommunications service, telecommunications equipment and customer premises equipment "require no further definition, and our sole task here is to elucidate their application in the context of Section 255."[5] It recognized, however, that while "many services are considered telecommunications services and, therefore, are clearly subject to the requirements of Section 255...there are some important and widely used services, such as voice mail and electronic mail, which under our interpretation fall outside the scope of Section 255 because they are considered information services"[6] under current FCC rules. The Commission asked whether Congress intended Section 255 to apply to a broader range of services than the services traditionally defined by the Commission as telecommunications services.[7]

The issue may actually be one of application rather than definition. The term telecommunications service (as well as the terms telecommunications equipment and customer premises equipment) obviously must be read in a manner consistent with statutory definitions. However, the ***application*** of these terms, in this context, presents some particular challenges.

1. As the Commission has noted -- and as industry has consistently pointed out -- it may be difficult to ensure accessibility by "retrofitting" some existing equipment, or equipment that is ready to go to market. The Section 255 rules will have their greatest impact on a going-forward basis, as companies begin to implement the Commission's accessibility rules through product design and service planning. That process, and much of the proposed rule, is necessarily focused on the networks and products of the future, while the Commission's discussions of

[5] NPRM, ¶ 36.

[6] NPRM, ¶ 42.

[7] NPRM, ¶ 42.

telecommunications services and information services in other contexts is firmly grounded in the present (and possibly the past).

As the Commission recognized (at ¶43), what falls within the scope of the terms "telecommunications services" and "information services" changes over time.* The Commission also has recently suggested that a service that might otherwise appear to be an "enhanced service" (under the old FCC terminology) or an "information service" (under the 1996 Telecommunications Act terminology) should nonetheless be treated as telecommunications service to the extent it is designed to facilitate the provision of "a basic transmission path over which a telephone call may be completed."[9] The Commission explicitly recognized that it is important to interpret telecommunications services to include those features that take advantage of the advanced capabilities of a communications network.

Likewise, in order to ensure accessibility for the future, Section 255 must be interpreted in a way that anticipates change and that ensures that equipment and services designed for the networks of the future are fully accessible -- even if some of the equipment features or services might be considered "information services" when viewed in light of the way the service is offered today. E-mail provides an interesting example. In its Report to Congress on Universal Service, the FCC suggested that e-mail was an information service in part because it was not sold on a

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[8] See North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (*NATA Centrex Order), recon.*, 3 FCC Rcd 4385 (1988).

[9] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, 11 FCC Rcd 21905 (1996) at ¶107.

stand-alone basis, but instead was typically provided as part of Internet service." However, several cellular phone providers are now bundling text messaging as part of a telecommunications service, and are developing CPE that includes a bundled e-mail-type service.

[10] At ¶79 of the Report, the Commission states that "it would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a "telecommunications service," and Web hosting to be an "information service." The service that Internet providers offer...is Internet access...[which] crucially involves information-processing elements. "

A network may be set up so that a message from one user is effectively transmitted instantaneously to the intended recipient; and the recipient may immediately "chat" with the sender. The distinction between the text message, and the voice message may only be one of format...a distinction which provides no basis for determining whether a service is or is not a telecommunications service, since the definition of telecommunications service in the Act is format-neutral." And certainly, even if one assumes that there is a distinction today, that distinction is disappearing as networks are designed to carry messages in the sender's chosen format, according strictly to the user's instructions. Consistent with the Commission's determinations in the universal service proceeding, Section 255 must be interpreted in a manner that is technologically neutral -- to provide no incentive or advantage to any provider based on network design or format of transmission.[12]

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[11] A telecommunications service is any service through which a company, for a fee, offers to transmit "between or among points specified by the user" "information of the user's choosing, without change in the form or content of the information as sent and received, and without regard to the facilities used.

[12] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd *8776,* (¶¶69-70) (1997) ***(Universal Service Order), as corrected by*** Federal-State Joint Board on Universal Service, Errata, FCC 97- 157, released June ***4, 1997, appeal pending in*** Texas Office of Public Utility Counsel v. FCC, No. 97-6042 1 (5th Cir. 1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order on Reconsideration, 12 FCC Rcd 10095 (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-21, 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400 (1997), ***as corrected*** *by* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Errata, 12 FCC Rcd 22493 (1997); Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-2 1, 96-45, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12437 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 9645, Third Report and Order, 12 FCC Rcd ***22485*** (1997), ***as corrected by*** Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45 and 97-l 60, Erratum, released Oct. 15, 1997; Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service, CC Docket Nos. 97-2 1, 96-45, Second Order on Reconsideration in CC Docket 97-2 1, 12 FCC Rcd 22423 (1997); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Third Order on Reconsideration, 12 FCC Rcd 22801 (1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Fourth Order on

Reconsideration, FCC 97-420, released Dec. 30, 1997, ***as corrected*** by Federal-State Joint Board on Universal Service, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, Errata, 13 FCC Rcd 2372 (1998).

In addition, networks and telecommunications systems are being set up so that a service that might be considered an enhanced service in isolation is in fact a gateway to completion of even ordinary telephone calls. Hence, callers may be routinely routed into voice mail systems that provide a menu of choices, one of which leads to a direct voice contact with the intended recipient of the call. If that voice mail system is not accessible, then it may become impossible to complete the telephone call altogether.

In order for Section 255 to work, it follows that Section 255 must be read broadly to apply to any service or equipment that may provide a transmission from one point to another point...and any adjunct service that facilitates that transmission, whether or not such service would be classified as an enhanced or information service today. Given the manner in which it is now being integrated into CPE, this should include, inter *alia,* e-mail service. This approach is fully consistent with Congressional intent. Congress intended for the Commission to look to the future in implementing Section 255. The Section was intended to "foster the design, development, and inclusion of "new features" in communications technology to permit more "ready accessibility of communications technology." Section 255 was viewed as "preparation for the future."[13]

[13] S. Rep. No. 104-23 at 52. The Senate language was generally adopted in conference. Given this Congressional intent it is apparent that Section 255 is a type of civil rights law, intended to be interpreted liberally over time to achieve the goal of ensuring access to communications technology to the disabled. See, e.g., Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989) (civil rights law was intended to be interpreted broadly to ensure that civil rights were not impaired.)

2. There is an additional reason to read Section 255 expansively -- or to otherwise adopt regulations that have that effect. In the Universal Service ***Order,*** the FCC explicitly deferred consideration of universal service objectives as they apply to the disabled to this proceeding. Under the universal service provisions of the Act, the Commission is to assure access to both telecommunications services and to information services. If the Commission were to read Section 255 narrowly, the effect (in conjunction with the Commission's deferral of the matter in the ***Universal Service Order)*** would be to deny universal access to information services to the disabled community. That result is not consistent with the plain language of the Act, which requires that "communication by wire and radio" be available "so far as possible" to "all people, and more specifically requires "access" "to telecommunications services and information services" in all regions of the nation.[14] The FCC has a broad mandate to ensure that there is universal service; but there cannot be universal service if covered services are provided in a manner so that they are not accessible to users.

[14] Communications Act of 1934, as amended, Section 1, Section 254(b)(2).

As a related matter, the Commission (at ¶46) proposes to subject a provider of telecommunications service to the requirements established in Sections 255(c) and 255(d) only to the extent it is providing telecommunications services, and asks whether it is practical to so limit the obligation. [15] To the extent that services are bundled together, so that there is both a telecommunications service component and a non-telecommunications component, the provider should be required to ensure that both components are accessible. Any other result is likely to create incentives to bundle services in a way that makes the underlying transmission service either less accessible in a technical sense, or more expensive for a disabled person (and hence inherently less accessible).

B. Telecommunications Equipment and Equipment Manufacturers.

The Commission seeks comment on several key issues related to the implementation of Section 255 with respect to equipment and equipment manufacturers. The FCC tentatively concludes that Section 255 only applies to equipment to the extent that it serves a telecommunications function, and asks for comment on this issue.[16] It tentatively concludes that the term equipment includes software that is bundled with the CPE but not other software, and seeks comment on the "bundled, unbundled" distinction." Finally, the FCC determines that there will be only one manufacturer of equipment, and proposes to identify that entity as the final

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[15] The Commission has properly recognized that the term "telecommunications provider" reaches all entities providing telecommunications service. Had Congress intended to reach a more limited universe, it could have used the defined term "telecommunications carrier." The fact that it did not do so is a good indication that Congress meant for Section 255 to sweep broadly, so that its accessibility goals could be achieved.

[16] NPRM, ¶53.

[17] NPRM, ¶56.

equipment assembler. The FCC seeks comment on this decision, which would generally mean that retailers and wholesalers are not manufacturers.[18]

1. Equipment that does not serve a telecommunications function is outside the scope of Section 255 by definition. However, all other equipment -- including multi-fur&ion equipment, is within the scope of Section 255, and should be accessible as to all functions, not just telecommunications service functions, This is clear from the definitions in the Telecommunications Act of 1996. Customer premises equipment is any "equipment employed" to originate, terminate or route "telecommunications." By its terms, the CPE is not limited to equipment used solely for "telecommunications services" or to that portion of the equipment used for telecommunications services. Hence, a cellular phone that is used to receive telephone calls and to receive stored text messages must be accessible for both purposes.

[18] NPRM, ¶¶ 60-61.

In any case, efforts to apportion equipment functionality would likely to present even more difficulties than efforts to apportion bundled services, discussed above. The Commission recognized the difficulty of apportioning equipment when it adopted rules for cable television equipment regulation and subjected equipment to rate regulation if it was used in the receipt of basic service in any way, even if the equipment was primarily useful or intended for non-basic service." Here, similarly, so long as the equipment can be used or is used for telecommunications, it should be subject to the strictures of Section 255.[20]

[19] Report and Order, MM Docket No. 92-266, "Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, " ¶¶ 283,406 (April 1, 1993).

[20] The FCC asked for comment on practical difficulties of applying Section 255 to a manufacturer that produces equipment that is intended for non-telecommunications purposes but that is in fact used for telecommunications purposes. The problem will largely prove illusory if the approach advocated by AFB above is adopted. However, in the rare case of a manufacturer that produces equipment that was intended for other purposes, but has a telecommunications function that the manufacturer did not recognize, obligations should attach when the manufacturer either takes steps to profit from the telecommunications functions, or becomes aware that the telecommunications use is a common use of its equipment by the ultimate purchaser.